CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 4840

Heard in Edmonton, Alberta on July 13, 2023

Concerning

CANADIAN PACIFIC KANSAS CITY RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE – MAINTENANCE OF WAY EMPLOYEE DIVISION

DISPUTE:

Post incident substance testing of Messrs Brown and Pilger.

JOINT STATEMENT OF ISSUE:

At approximately 0800 on April 26, 2019, Machine Operator Brown reversed the south back track switch Medonte and broadcast the switch position, which was acknowledged by Foreman Pilger. Machine Operator Brown travelled into the back track, derailing his switch tamper over the applied south end derail.

Following the incident, Foreman Pilger and Machine Operator Brown were requested to participate in a substance test.

The Union grieved the testing on June 7, 2019, alleging:

1) The grievors were asked to submit to substance testing in violation of the company's own policy guidelines as set out in HR Policy 203.1, section 5.2.2; and,

2) The Company's decision to require testing violated not only Policy 203.1 but the grievors' rights to privacy.

The Union requests that (1) It be declared that the Company wrongly required the grievors to undergo substance testing on April 26, 2019 and that, by doing so, violated its own Drug and Alcohol Testing Policy as well as the grievors' rights to privacy, (2) the results of the tests be declared illegitimately obtained and therefore must be set aside, (3) Mr. Pilger be compensated for the five days he was held out of service following his test, and (4) the Company be ordered to issue a formal apology to the grievors.

The Company disagreed with the Union's allegations and denied the Union's request on the following basis:

1) The incident was a *safety related incident* as contemplated by Policy HR 203.1;

2) Foreman Pilger and Machine Operator Brown were both involved in the incident in question;

and,

3) The Company maintains Messrs. Pilger and Brown were appropriately post incident tested in accordance with Policy 203.1 and arbitral jurisprudence. As such, the Company did not violate their privacy rights.

For the foregoing reasons and those provided during the grievance procedure, the Company maintains its actions were appropriate in all the circumstances and requests the arbitrator be drawn to the same conclusion and dismiss the Union's position in its entirety.

FOR THE UNION:	**FOR THE COMPANY:**
(SGD.) W. Phillips	**(SGD.) L. McGinley**
President - MWED	Director Labour Relations

There appeared on behalf of the Company:

L. McGinley	– Director, Labour Relations, Calgary
J. Bairaktaris	– Director, Labour Relations, Calgary

And on behalf of the Union:

W. Phillips	– President MWED, Ottawa
D. Brown	– Counsel, Ottawa

AWARD OF THE ARBITRATOR

I – Issue

[1] The issue between the parties is the legitimacy of the Company's requirement that Mr. Pilger and Mr. Brown submit to substance testing as a result of an incident which occurred on April 26, 2019.

[2] For the reasons which follow, the Company has not established its legitimacy to require either Mr. Brown or Mr. Pilger to submit to a substance test as a result of this minor incident. The Company has not followed its own Policy regarding when a substance test is required, in this case.

[3] The Grievance is allowed.

II - Facts

[4] Mr. Pilger is an Extra Gang Foreman, with 8 years of service at the time of the incident. Mr. Brown is a Special Group Machine Operator, also with 8 years of service.

[5] On April 26, 2019, Mr. Brown was operating a Pandrol Jackson Tamper at the "tail end" of the work area. Mr. Pilger was an Extra Gang Foreman on that day and was working at the front end of the work area.

[6] The Company maintains that Mr. Brown was the sub-foreman and that Mr. Pilger was the Foreman for the tail end crew. The Union maintains that another individual was

sub-Foreman and not Mr. Pilger, but that it is not known who that was, as the Company did not conduct an Investigation.

[7] In view of my finding, nothing turns on this factual difference.

[8] The Tamper derailed when Mr. Brown proceeded into a back track over a derailer that was not properly aligned. The Tamper was placed back on the rails by jacks after the derail and work continued.

[9] At the time of the incident, Mr. Pilger was walking back toward the tail end with the labourers. Just before the derail, Mr. Brown broadcast the switch position, that it was lined, locked and checked for the reverse position. Mr. Pilger acknowledged the broadcast.

[10] I am satisfied the purpose of the broadcast requirement was so that Mr. Brown could make a 'double check' that what he himself had just said over the radio was in fact what he had done. It was not Mr. Pilger's responsibility to view the switch and ensure Mr. Brown had lined it as broadcast. This is demonstrated by the fact that the RTC can also acknowledge the broadcast, if no one else is available to do so. Even as Foreman, I am satisfied Mr. Pilger was entitled to rely on Mr. Brown's statement that he had properly aligned the derail and was aware of its location.

[11] The Company chose not to investigate the incident. Mr. Brown signed an "Admission of Responsibility" (AOR) for the derail, which I am satisfied is the lowest level of discipline on the scale used by the Company.

[12] The Company required both Mr. Pilger and Mr. Brown to submit to substance testing under the Alcohol and Drug Policy and Procedures; Policy HR 203 and 203.1 (the "Policy"). Mr. Brown's test was negative, while Mr. Pilger's urinalysis test was positive for marijuana. He was dismissed and later reinstated. The reasonableness of the dismissal of Mr. Pilger is not before me. Rather, the issue in this Grievance is the legitimacy of the testing requirement for both Mr. Pilger and Mr. Brown.

III - Arguments

[13] The Company argued its Policy permitted testing for a "significant work related incident, a safety related incident or a near miss or as part of an investigation". It pointed

out that this derail was in place to prevent movement of equipment out onto the mainline. It argued this qualified as both a safety related incident and a “near miss” and supported testing. The Company argued it was appropriate to test both Mr. Brown and Mr. Pilger, and not the balance of the crew, since there was no involvement by the balance of the crew.

[14] Regarding Mr. Brown, the Company argued his actions and/or omissions were the cause of the incident, as he failed to place the derail in the non-derailing position before proceeding over it, which breached CROR 104.5 and section 12 of the Rule Book for Engineering Employees.

[15] Regarding Mr. Pilger, the Company argued: He was the Foreman on April 26, 2019 and that by Standard Practices Circular 41, item 3.2, Foremen are “in charge” of the employees assigned to them and must “see that employees understand and properly perform their duties”; he was required to be familiar with the location of the derail (CROR 104.5(d) and Rule Book for Engineering Employees item 12.1(a)); he had a “higher level of responsibility” and an “obligation to see that Mr. Brown understood and properly performed his duties”; and that Mr. Pilger was in “radio communication” with Mr. Brown immediately before the incident and was not simply “going about his business conducting other work prior to the incident” as argued by the Union. It urged there was a “clear link” between the incident and Mr. Pilger’s actions or omissions as Foreman.

[16] For its part, the Union argued: The Company has violated the specifics of its own Policy when it required that Mr. Pilger and Mr. Brown submit to substance testing; none the circumstances noted in its own document as conditions for testing were present in this incident; the incident was – and was treated as – minor; there was no injury or damage; the incident was not significant or a “near miss” or safety related; and an incident must at least have the “potential” to cause injury, damage or a serious safety concern, which this incident did not.

[17] The Union argued that under the terms of the Policy, an individual is not to be tested if “the act or omission of the individual(s) could not have been a contributing factor to the incident”. It argued that Mr. Pilger is such an individual. It argued that the Company appears to have ordered testing “as a matter of course” instead of after consideration of

whose actions could have caused or contributed to the incident. It argued the area was under the protection of a sub-Foreman and not Mr. Pilger. The Union argued Mr. Pilger was not even present when the switch was aligned and had nothing to do with the derail. He was working elsewhere when the derail occurred. He did not have any impact on the derail incident and there was nothing he could have done from where he was located to prevent the derail. It pointed out that since there was no investigation, there is no transcripts to provide detail of what occurred and no evidence of damage is on the record. It noted that Mr. Brown formally admitted responsibility.

IV - Analysis and Decision

[18] This is not a new issue between these parties. There are several recent cases which address when post-incident substance testing is legitimate in this industry and which interpret the Company's Policy.

[19] As noted by the Supreme Court of Canada[1], requiring an employee to submit to any type of substance testing is considered an invasion of privacy in this country. As this Arbitrator outlined in **CROA 4836**[2], there are four situations where substance testing is justified. One of those situations is after an incident has occurred.

[20] However, it must be emphasized that the mere "fact" that an incident occurred – even in a safety-sensitive industry – does not itself give cause for testing. While there are situations where the need for testing will be obvious from the seriousness of the incident, not all incidents qualify.

[21] The law has developed to impose limitations for when testing is appropriate post-incident, and who can be tested. In *Saskatchewan Health Authority v. Health Sciences Association of Saskatchewan*[3], Arbitrator Ish outlined the principles as they relate to post-incident testing and they were reproduced in **AH732**.[4] I am prepared to adopt these principles as representing the current state of the law relating to post-incident testing and will emphasize only those that are applicable.

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[1] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.* 2013 SCC 34 a
[2] At para. 37.
[3] At paras. 34 and 35.
[4] AT para. 35.

[22] It was also noted in **AH732** that the Company's Policy was "alive to these important principles"[5].

[23] Testing cannot be a "forgone conclusion" in the words of the arbitrator in **AH732.** Rather, an arbitrator must consider the Company's evidence regarding its assessment when that decision is challenged, to ensure that testing was not directed "as a matter of course" resulting in an invasion of an employee's right to privacy.

[24] Considering first Mr. Pilger, one of the legal principles which has developed is that an employer must "investigate whether actions or omissions of the employee contributed to or caused the accident"; there must be a "link". This is echoed in the Policy of the Company, which states:

> Post-incident testing is not justified if it is clear that the act or omission of the individual(s) could not have been a contributing factor to the incident e.g. structural, environmental or mechanical failure or the individual clearly did not contribute to the situation.

[25] In **AH732** a high rail truck had derailed. There were some memoranda from the Company referring to "drilling down" and a reference to an "incident form", but those documents were not provided to the arbitrator. The arbitrator considered that the derail of a hi-rail truck – on its own – did not provide sufficient evidence and that the need for testing had not been substantiated under the Company's Policy.

[26] The arbitrator acknowledged – as do I – that there are situations in this industry where "testing may be obvious".

[27] This was a de-rail of a tamper when it contacted the derailing device. It is analogous to the de-rail of the high-rail truck in **AH732**. In this case - as in **AH732** and **CROA 4256** - there is no evidence that the Company engaged in any process to determine or assess Mr. Pilger's involvement beyond that he had a "radio communication" with Mr. Brown prior to the incident.

[28] Had the Company asked only a few questions of Mr. Pilger, they would have realized that while it was true Mr. Pilger did have 'radio communication" with Mr. Brown before the incident, that radio contact was not to provide any directions or oversight but

[5] At para. 36.

was only an acknowledgement of Mr. Brown's broadcast. Mr. Pilger was not required to verify the information in that broadcast – nor did he.

[29] It was not an onerous obligation on the Company to make that minimal inquiry before determining to test Mr. Pilger.

[30] Making an acknowledgment does not demonstrate to this arbitrator's satisfaction that Mr. Pilger could have caused or contributed to this incident, as required by the Policy to substantiate his test.

[31] The only other basis that was present in this case was that Mr. Pilger was a Foreman and had an over-arching responsibility for the work. However, even if its accepted that Mr. Pilger was the Foreman for Mr. Brown's work, "overall responsibility" does not support the weight of a testing requirement: **CROA 4256**.

[32] The "necessary link" that is required to establish the connection between Mr. Pilger's actions or omissions in this case is missing.

[33] I am therefore drawn to the same conclusion as the Union that the Company violated the terms of its own Policy by testing Mr. Pilger.

[34] Turning to Mr. Brown, while he was the Machine Operator and proceeded over the derailer, the legal principles state that the mere "fact" of an incident occurring is "not, of itself, sufficient reason to breach an employee's right to privacy. There must be "more than an accident, near miss *or potentially dangerous incident* to justify an alcohol and drug test" and "[t]here must be more at stake than trivial damage absent other issues such as an injury or serious injury concern". There must also be "sufficient gravity to the event in a near miss…to justify mandatory testing – serious damage must almost have occurred"[6].

[35] I agree with the Union that these elements are missing in this case. The incident was not "significant" but was rather "minor" and was treated by the Company as minor. Derailing of equipment is potentially dangerous, but it is not only potential that must be considered but what actually occurred: "there must be more at stake than trivial damage".

[6] *Saskatchewan Health Authority v. HSAS*, at para. 68, emphasis added

[36] This incident was at the “far end” of the severity scale, to borrow the words used in **AH732**. No damage occurred to the equipment or track and no injuries occurred to any individual.

[37] There is nothing in the records before me to establish the basis on which the Company chose to test Mr. Brown beyond the fact that an incident occurred: he ran over a switch. Under the law – and in these circumstances – that is not sufficient.

V – Conclusion

[38] A declaration is made that the Company did not have cause to test either Grievor, in the circumstances of this case.

[39] The Grievances are allowed. Mr. Brown did not suffer any financial loss. Mr. Pilger is to be made whole for all losses suffered.

[40] I retain jurisdiction to address any issues with the application or implementation of this Award.

November 10, 2023

CHERYL YINGST BARTEL
ARBITRATOR